

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

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CRIMINAL TRAFFIC

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STATE OF OHIO : Case No. B1400110
Plaintiff, : Judge Patrick Dinkelacker
v. :
MOTION FOR LEAVE TO
FILE DELAYED POSTCONVICTION
PETITION AND/OR MOTION FOR
RELIEF FROM JUDGMENT
TRACIE M. HUNTER :
Defendant. :

Pursuant to Crim.R. 35 and R.C. 2953.23, and alternatively Crim.R. 57(B) and Civ.R. 60(B), Tracie Hunter moves for leave to file a delayed post-conviction petition seeking dismissal of her indictment, or in the alternative relief from judgment, on the grounds that recent events involving Ohio Supreme Court Justice Patrick DeWine's use of his public office to obtain employment for his son with Hamilton County Prosecuting Attorney Joe Deters' office, which did not result in Justice DeWine being charged with any crimes or even found guilty of ethics violations, underscores that Judge Hunter committed no crime and that her conviction should be vacated and her indictment dismissed. A memorandum in support of this motion is attached.

Respectfully submitted,


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I. INTRODUCTION

A jury convicted Judge Tracie Hunter of Count Six of the indictment, which charged her with Having Unlawful Interest in a Public Contract. To find her guilty of that offense, the prosecution had to prove beyond a reasonable doubt that Hunter, “a public official, knowingly authorized, or employed the authority or influence of her office to *secure the authorization* of any public contract.” R.C. 2921.42 (emphasis added). With respect to the count for which she was convicted, the prosecution alleged Hunter used her position as a judge to interfere with the firing of her brother by giving his lawyer certain Juvenile Court documents allegedly to aid his defense. No documents were ever identified let alone presented at trial.

Hunter argued on appeal that the plain language of the statute, which forbade her as a public official from “securing the authorization of any public contract,” did not prohibit the conduct the state alleged she committed because she played no role in hiring her brother, whose Juvenile Court employment began before she became a judge. Thus, she did not “secure the authorization of any public contract” relating to her brother’s employment. Although the First District Court of Appeals disagreed with Hunter’s plain-language interpretation of the statute, concluding that the statute “includes not only interference with the initial decision to employ a family member, but also extends to other areas of employment, including termination proceedings,” *State v. Hunter*, 1st Dist. Hamilton Nos. C-140684, C-140704, C-140717, 2016-Ohio-123, ¶ 21, new information obtained since the Court affirmed Hunter’s conviction indicates that the statute is vague and unenforceable and violates due process and equal protection under both the United States and Ohio Constitutions.

Specifically, in early 2018, Special Disciplinary Counsel Bradley N. Frick filed a complaint against Justice Patrick DeWine alleging, among other things, that Justice DeWine violated R.C.

2921.42 by asking Hamilton County Prosecuting Attorney Joseph T. Deters to hire the Justice's son, which Deters did. Because Deters' office regularly appears before the Ohio Supreme Court, it was improper for Justice DeWine to solicit employment on behalf of his son with Deters' office, which created the perception that the Hamilton County Prosecutor could get favorable treatment by acceding to the Justice's request. Unlike Hunter, however, no criminal charges were brought against Justice DeWine, and eventually the complaint Special Disciplinary Counsel Frick filed against Justice DeWine was dismissed.

The fact that Justice DeWine's request for employment for his son did not result in criminal charges, highlights a fundamental problem with Hunter's conviction: either the state denied her equal protection of the law by not prosecuting Justice DeWine, whose actions appear to fall more squarely within the statute's prohibition, or R.C. 2921.42 is so vague and lacking in definiteness as to its meaning that it permits arbitrary and discriminatory enforcement based on improper considerations, such as the relationship between the public official whose conduct is at issue and the prosecuting attorney. Either way, Hunter's conviction cannot stand.

I. STATEMENT OF FACTS

A. The Conduct Underlying Tracie Hunter's Conviction

Judge John Williams hired Stephen Hunter to work as a juvenile correctional officer in January 2012. (T.p. 9/24/2014, p. 2328). At the time Judge Williams hired Stephen, Tracie Hunter was not yet a judge for the Hamilton County Juvenile Court. (*Id.* at p. 2319).

On July 7, 2013, Stephen was accused of striking a youth who was being processed for intake at the detention center. (*Id.* at p. 2333). The next day the assistant superintendent of the detention center initiated an investigation of the incident, which concluded that Stephen had hit

the juvenile. (*Id.*). The superintendent of the detention center then recommended that Stephen be fired. (*Id.* at p. 2334).

Stephen retained attorney Janaya Trotter to appeal his termination. (T.p. 10/2/2014, p. 3156). The night before the appeal hearing, Stephen met with Trotter at a gas station, where he paid her to represent him at the appeal hearing, and also gave her some documents. (*Id.* at p. 3161). Stephen testified that he had received some documents from Judge Hunter that he gave to Trotter that evening (*id.*), but the state failed to introduce any evidence identifying the specific documents or their contents.

Moreover, Trotter testified that the only documents Stephen gave her that evening were the documents he had been given at the termination hearing and one additional document. (*Id.* at p.3171). Trotter said she refused to accept the one document because she knew she would receive it the next day at the hearing. (*Id.*). However, Trotter also testified that she did not know where the document she had refused to accept had come from. (*Id.* at p. 3186). Additionally, Trotter testified that Judge Hunter did not (1) give her any information or documents related to Stephen's termination proceeding; (2) discuss her brother's case; or (3) assist Trotter in her representation of Stephen. (*Id.* at pp. 3155-56). Trotter further testified that she was unaware of Judge Hunter doing anything unethical. (*Id.* at p. 3185). Finally, Dwayne Bowman, who served as the superintendent of the Hamilton County Youth Detention Center and who testified on behalf of the state, admitted that Judge Hunter did not direct him to make a certain decision regarding Stephen's termination. (T.p. 9/23/2014 at pp. 2203-04).

Judge Hunter neither directly nor indirectly involved herself in Stephen's termination hearing, nor did she do anything to affect its outcome. Indeed, at the conclusion of Stephen's appeal, his termination was upheld. (*Id.* at p. 2173). Unlike Justice DeWine, Hunter did not use

her position as a judge to obtain a public contract for a family member; in fact, as discussed earlier, another judge hired Stephen before Hunter took the bench.

B. Justice DeWine's Conduct

“Joe, Can you find a spot in your internship program for my son Matt this summer,” began the email Justice DeWine sent Joe Deters on April 23, 2017. The email concluded: “It would be a great experience for him. If you can, I would really appreciate it.” (Amend. Cplt. against R. Patrick DeWine (“DeWine Cplt.”), Feb. 13, 2018, Exh. 12). Deters wrote: “Another . . . for sure.” (*Id.*). As Deters’ response foreshadowed, he hired Justice DeWine’s son as a paid intern in the Hamilton County Prosecutor’s Office. (DeWine Cplt. at ¶69).

As the Special Disciplinary Counsel alleged, Matt DeWine’s paid employment with Deters’ office constituted a public contract. (*Id.* at ¶71). In asking Deters to hire Matt DeWine, Justice DeWine used the power and prestige of his judicial office, as the Special Disciplinary Counsel noted, “to advance his son’s personal and economic interests . . . with the knowledge that such request from [Justice DeWine], by virtue of [the Justice’s] office, put Deters in an awkward position” of saying “‘yes,’ either because he had no choice or to curry favor with the Justice.” (*Id.* at ¶74(b)). However, to date, Justice DeWine has faced no criminal charges for seemingly violating R.C. 2921.42 on its face by using his office to secure employment for his son with the Hamilton County Prosecuting Attorney’s Office.

II. LAW AND ARGUMENT

Ohio Supreme Court Justice Patrick DeWine engaged in conduct that, on first blush, appears to have violated R.C.2921.42’s prohibition against a public official using his or her office to “secure authorization of any public contract,” in his case by asking Hamilton Prosecuting

Attorney Joe Deters to hire the Justice's son. Yet, unlike in Judge Hunter's case, Joe Deters did not appoint a special prosecutor to investigate Justice DeWine for violating R.C. 2921.42.

The fact that Justice DeWine has faced no charges says one of two things: either (1) Justice DeWine's conduct did not violate R.C. 2921.42 because the statute, as will be explained in detail below, applies in only a narrow set of circumstances, which supports Tracie Hunter's argument that the statute never applied to her alleged conduct; or (2) Justice DeWine violated the statute and escaped charges because he is politically connected, where Hunter, who angered the local political establishment was selectively prosecuted, convicted and sentenced to six months in jail, even though she committed no crime, thus violating her rights to due process and equal protection of the law under both the Ohio and United States Constitutions. In either case, the court should vacate Hunter's conviction and dismiss the indictment.

Before discussing the procedural vehicles for granting Hunter relief, it is helpful to understand her statutory interpretation argument and how the lack of charges against Justice DeWine bolsters Hunter's claim that she committed no crime.

A. R.C.2921.42 Does Not Apply Where a Public Official Provides Documents to a Relative.

The state charged Judge Hunter with Having Unlawful Interest in a Public Contract in violation of R.C. 2921.42(A)(1) for allegedly giving documents to her brother in advance of his termination hearing. While the allegations were not true, and no documents were identified or presented at trial, such conduct does not violate the statute.

R.C. 2921.42(A)(1) reads as follows:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public

official's business associates has an interest;

* * *

(I) As used in this section:

(1) "Public contract" means any of the following:

(a) The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;

The phrase "secure authorization" has no "technical or particular meaning" in Ohio law. "[S]ecure authorization," accordingly, "[must] be read in context and construed according to the rules of grammar and common usage." *See R.C. 1.42.*

"Secure," as a transitive verb, has the following relevant definitions:

(1)(a): to relieve from exposure to danger : act to make safe against adverse contingencies // *secure* a supply line from enemy raids
(b): to put beyond hazard of losing or of not receiving : guarantee // *secure* the blessings of liberty — *United States Constitution*

* * *

(3)(a): to get secure usually lasting possession or control of // *secure* a job
(b): BRING ABOUT, EFFECT

Merriam-Webster, secure, <http://www.merriam-webster.com/dictionary/secure> (accessed July 27, 2019) (italics and all caps in original). Authorization is "official permission to do something." *Black's Law Dictionary*, authorization (10th Ed.2014). Meanwhile, "acquire"—used in the definition of "public contract," discussed above—is defined as: "1: To gain possession or control of; to get or obtain." *Id.*, acquire.

A basic canon of statutory construction is that "each part or section [of a statute] should be construed in connection with every other part or section to produce a harmonious whole." 2A

Sutherland, *Statutes and Statutory Construction*, Section 46.5 (7th Ed.2014). Because the General Assembly has defined “public contract” as a purchase or acquisition, the only meaning of “secure” that makes sense with the phrase “authorization of any public contract” is “to get.” The state’s position that the statute prohibits attempting to prevent termination of a public contract is inconsistent with the concept of acquiring—getting or obtaining—something. Under the state’s construction, “secure authorization of any public contract” means: to keep from losing the permission to acquire an individual’s employment by the State. This definition is illogical: it implies one can lose something one has not yet obtained. Therefore by concluding that ““secure’ can also relate to preventing exposure to danger, to make safe, or to make so strong, stale or firm as to insure safety and financial security,” and therefore means that “the statute encompasses not just the initial acquisition of employment, but also any subsequent conduct designed to protect the employee’s position,” *State v. Hunter*, 2016-Ohio-123, ¶ 18 (internal quotation marks and citation omitted), the First District ignored the requirement to read the statute to produce an harmonious whole.

In short, the only sensible interpretation of “secure authorization of any public contract” is to obtain permission to acquire an individual’s employment by the State—that is, to get permission for the state to hire someone. The idea that securing a public contract requires an “acquisition” is supported by Ohio case law. *See, e.g., Walsh v. Bollas*, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992) (hiring a family member violated R.C. 2921.42 in a civil case); *State v. Creasman*, 1st Dist. Hamilton No. C-970730, 1999 WL 147809, *2 (Mar. 19, 1999) (directly authorizing a purchase from spouse’s company violated R.C. 2921.42); *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, 772 N.E.2d 1239, ¶ 16 (9th Dist.) (mayor violated R.C. 2921.42 by authorizing two contracts in which his brother had an interest). Indeed, counsel has not found a

single case where a public official was convicted under R.C. 2921.42(A)(1) for using his influence to prevent the termination of an employment contract.

Moreover, although the First District decided that its “reading of the statute comports with the position of the Ohio Ethics Commission on the matter,” which “concluded that the statute ‘extends beyond the initial hiring of the family member and prohibits a public official from participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of an individual contract of employment for a member of his family,’” *State v. Hunter*, 2016-Ohio-123, ¶ 19 (citation omitted), ethics opinions, while sometimes useful in interpreting statutes, “are not binding on the courts.” *See State v. Urbin*, 100 Ohio St.3d 1207, 2003-Ohio-5549, 797 N.E.2d 985, ¶ 13 (Moyer, C.J., concurring in dismissal of the appeal as improvidently allowed).

In sum, construing words according to their ordinary meaning and in context with the statute’s definition of public contract, R.C. 2921.42 requires the state to prove the following elements: that (1) a public official; (2) knowingly authorized or employed the authority of her office; (3) to secure authorization of a public contract (i.e., in this context, acquisition of employment with the state because of how “public contract” is defined); (4) in which the official or a member of the official’s family has an interest. At her trial, the state failed to prove that then-Judge Hunter “secured the authorization of any public contract,” as defined by the statute. At the time Hunter took the bench, her brother Stephen was already employed as a juvenile correctional officer. Thus, there is no way Hunter could have used the influence of her public office to secure authorization (that is, acquire employment) for her brother because she had yet to assume public office when he began work as a juvenile correctional officer. Because Hunter was not involved in Stephen’s hiring, the state failed, as a matter of law, to prove that she violated R.C. 2921.42(A)(1).

B. Justice DeWine’s Non-Charges for Conduct That More Clearly Falls within R.C.2921.42’s Prohibition Vindicates Tracie Hunter’s Argument that She Committed No Crime.

As a sitting justice of the Ohio Supreme Court, Pat DeWine contacted Hamilton County Prosecuting Attorney Joe Deters to seek paid employment for the Justice’s son Matt. Thus, it appears that Justice DeWine (1) as a public official; (2) knowingly authorized or employed the authority of his office; (3) to secure authorization of a public contract (i.e., acquisition of employment); (4) in which a member of his family, his son Matt, had an interest. Yet, Justice DeWine has not been charged with violating R.C. 2921.42. Setting aside for the moment one explanation for no charges being brought against Justice DeWine—he is the politically connected son of Ohio’s Governor and a friend of Joe Deters—another possible reason for no charges exists: any ambiguity in the statute must be resolved against the state and in favor of not bringing charges.

As the Ohio Supreme Court has explained, “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.” *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, at ¶ 10 (internal quotation marks and citations omitted). This principle, known as the rule of lenity, “provides that sections of the Revised Code that define offenses or penalties ‘shall be strictly construed against the state, and liberally construed in favor of the accused.’ Under the rule, ambiguity in a criminal statute is construed strictly so as to apply the statute only to conduct that is clearly proscribed.” *Id.* See also R.C. 2901.04(A) (providing that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused”). Additionally, ambiguity exists whenever “the language is susceptible of more than one reasonable interpretation.” *State v. Jordan*, 89 Ohio St. 3d 488, 492, 2000-Ohio-225, 733 N.E.2d 601.

Justice DeWine was likely not charged because “secure authorization of any public contract” is ambiguous. To the extent the rule of lenity protected Justice DeWine from criminal charges, it should have also protected Judge Hunter. As discussed earlier, the only sensible interpretation of R.C. 2921.42’s prohibition against a public official “securing authorization of any public contract” is to bar public officials from using their power to obtain employment for a relative. However, the statute does not proscribe an official using her office to obtain documents to defend against termination from employment (the State’s theory of Judge Hunter’s conduct), especially when Judge Hunter, by law, was the statutory keeper of all juvenile court records. As the statutory employer of the court, Judge Hunter was required by law to respond to all public records requests and turn over any documents requested by anyone, including personnel files. While “secure” injects ambiguity into the statute because, as the First District noted, the word also means “preventing exposure to danger, to make safe, or to make so strong, stale or firm as to insure safety and financial security,” *State v. Hunter*, 2016-Ohio-123, ¶ 18 (internal quotation marks and citation omitted), the court should have resolved the ambiguity against the state. Because Justice DeWine has not been charged with violating the statute, then Judge Hunter should have never been charged either, and her conviction should be dismissed. *See McDonnell v. United States*, 136 S.Ct. 2355, 2373 (2016) (reversing public corruption conviction of former Virginia Governor, stating: “A related concern is that, under the Government’s interpretation, the term ‘official act’ is not defined with sufficient definiteness that ordinary people can understand what conduct is prohibited, or in a manner that does not encourage arbitrary and discriminatory enforcement. Under the standardless sweep of the Government’s reading, public officials could be subject to prosecution, without fair notice, for the most prosaic interactions. Invoking so shapeless a provision to condemn someone to prison for up to 15 years raises the serious concern that the

provision does not comport with the Constitution's guarantee of due process. Our more constrained interpretation of § 201(a)(3) avoids this vagueness shoal.”) (internal quotation marks and citations omitted).

C. Tracie Hunter Should be Granted Leave to File a Delayed Postconviction Petition.

Ordinarily, a petition for postconviction relief, in cases where there is a direct appeal, “shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication.” R.C. 2953.21(A)(2). However, R.C. 2953.23(A)(1)(a)(b) provides an exception to R.C. 2953.21’s filing deadline where the “petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief,” and “shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted.”

Here, Tracie Hunter meets the requirements for filing a delayed postconviction petition under R.C. 2953.23. First, the facts upon which Hunter will rely upon if granted leave to file a delayed postconviction petition—Justice DeWine’s solicitation of employment for his son from Joe Deters—did not occur until 2017 and did not become publicly known until 2018. Thus, Hunter necessarily was unavoidably prevented from discovering these facts by the time she had to file a postconviction petition under R.C.2953.21.

Second, the fact that the state did not charge Justice DeWine with a crime even though he directly sought to secure employment for his son and in fact secured such employment constitutes clear and convincing evidence that Judge Hunter, who did not use her power to obtain employment for her brother, did not violate the statute. Moreover, her brother was terminated from his job making it factually and legally impossible for her to have secured employment when in fact the

opposite occurred. Because she committed no crime, her conviction is a denial of due process. *See Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781 (1979) (“It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.”) (citations omitted).

Additionally, Justice DeWine’s non-prosecution for conduct that clearly appears to violate R.C. 2921.42 than Hunter’s, indicates that she was selectively prosecuted in violation of her right to equal protection of the law under both the Ohio and United States Constitutions. *See Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 534 199-Ohio-285, 709 N.E.2d 1148 (holding that “the prosecutor’s discriminatory enforcement of [a local ordinance] against privately owned, for-profit billiard rooms and not against the city-owned, public recreation centers violates defendant’s equal protection as guaranteed by the United States and Ohio Constitutions”).

Accordingly, Hunter meets the standard for filing a delayed postconviction petition under R.C. 2953.23. Accordingly, the court should grant Hunter’s motion for leave to file a delayed post-conviction petition.

D. In the Alternative, Tracie Hunter Should Be Granted Relief from Judgment under Civ.R. 60(B).

If anyone should have known how inappropriate—and criminal—it was to solicit a public contract, it should have been Justice DeWine, who while a First District Court of Appeal judge sat on the panel that affirmed Tracie Hunter’s conviction. Yet, fifteen months after voting to affirm Hunter’s conviction, then-Justice DeWine sent an email to Joe Deters requesting that Deters hire the Justice’s son as a summer intern. What Justice DeWine did in successfully seeking public employment for his son was far more egregious and a much clearer violation of the R.C. 2921.42 than anything that the state claimed Hunter did, especially where any alleged efforts by her were unsuccessful and her brother was fired. But Justice DeWine has never been—and probably will

never be—charged. His non-prosecution reveals an unseemly reality of Hamilton County “justice”: politically connected white officials can do what they want with impunity while non-politically connected African-Americans can be charged and convicted of crimes they did not commit. The court should right the scales of injustice in Hunter’s case by granting her relief from judgment under Civ.R. 60(B).

Crim.R. 57(B) provides as follows: * * * “If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.” Additionally, Civ.R. 60(B) states, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or **(5) any other reason justifying relief from the judgment.** The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. * * *

(emphasis added).

The Ohio Supreme Court has made clear that criminal defendants can seek relief under Civ.R. 60(B) in cases where the criminal rules lack a procedure for the relief the defendant seeks: “Today we hold that the plain language of Crim.R. 57(B) permits a trial court in a criminal case to look to the Rules of Civil Procedure for guidance when no applicable Rule of Criminal Procedure exists.” *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, at ¶10. The Court held ultimately that Schlee could not use Civ.R. 60(B) in his particular case because he was really seeking post-conviction relief available under Crim.R. 35:

The Civ.R. 60(B) motion filed by Schlee was filed subsequent to his direct appeal, claimed a denial of constitutional rights, and sought reversal of the judgment rendered against him. We conclude, therefore, that the Civ.R. 60(B) motion filed by Schlee could have been filed as a petition for postconviction relief. Thus, it is not necessary to look to the Civil Rules or other applicable law for guidance in the way Crim.R. 57 intends, because a procedure ‘specifically prescribed by rule’ exists, i.e., Crim. R. 35.

Schlee, at ¶12.

Here, the criminal procedure rules do not provide Tracie Hunter with mechanism to seek interests of justice relief separate and apart from any constitutional claims she has. Accordingly, the court should look to Civ.R. 60(B), which allows relief from judgment for “any . . . reason justifying relief from the judgment.” For the reasons discussed above, and in the interests of justice, the court should grant Tracie Hunter relief from judgment and vacate her conviction.

Respectfully submitted,

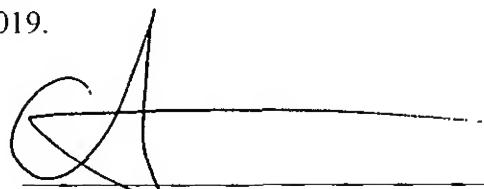


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion and memorandum was served by U.S. First Class mail upon Special Prosecutor R. Scott Croswell, III, Croswell & Adams Co. LPA, 1208 Sycamore Street, Olde Sycamore Square, Cincinnati, Ohio, 45202, and Special Prosecutor Merlyn D. Shiverdecker, Carr & Shiverdecker, 817 Main Street, Suite 200, Cincinnati, Ohio 45202, on this 27th day of July, 2019.



David A. Singleton